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No. 650

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD HANKINSON, PETITIONER

v.

HON. FRANCIS L. VAN DUSEN AND
HON. C. WILLIAM KRAFT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The memorandum and order of the District Court directing an impartial medical examination, and the order of the Court of Appeals denying petitioner's petition for writs of mandamus and prohibition are set forth at Pet. App. 1a–4a. No opinions were delivered by the courts below with respect to these orders.

JURISDICTION

The order of the Court of Appeals was entered on October 21, 1958. The petition for a writ of certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying petitioner's application for writs of mandamus or prohibition to annul a District Court order directing pretrial medical examinations of petitioner, the plaintiff in a personal injury action, by court-appointed physicians, and apportioning the costs of such examinations.

2. Whether the District Court lawfully promulgated a local rule which provided for (1) examinations of injured persons in personal injury cases by impartial medical experts selected by the judge from panels of physicians; and (2) apportionment of the experts' fees equally among the parties, unless otherwise directed.

3. Whether the District Court acted within its discretion in applying its rule in this case.

RULES INVOLVED

1. Rule 35, Federal Rules of Civil Procedure:

Physical and Mental Examination of Persons

(a) *Order for Examination.*—In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written

report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

2. Rule 54(d), Federal Rules of Civil Procedure:

Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

3. Rule 83, Federal Rules of Civil Procedure:

> *Rules by District Courts*
>
> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. Local Rule of the United States District Court for the Eastern District of Pennsylvania, adopted June 2, 1958:

> RULE FOR MEDICAL EXAMINATION IN PERSONAL INJURY ACTIONS ADOPTED PURSUANT TO F.R. CIV. P. 83 AND SUPPLEMENTING F.R. CIV. P. 35
>
> A. In any personal injury case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing, if such hearing be requested by either counsel, order such examination and report. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with a committee appointed by the President of the Pennsylvania Bar Association and with the court.

Copies of the report of the examining physicians will be made available to all parties.

B. The compensation of the expert or experts shall be fixed by the judge ordering the examination and shall be paid equally by each party to the litigation unless such judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations.

C. If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party, but without compensation by any litigant.

STATEMENT

This action was brought by petitioner against the Pennsylvania Railroad Company on July 17, 1956, under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, *et seq.* By order of the District Court on January 9, 1957, the United States was impleaded as a third-party defendant under the Federal Tort Claims Act.

In his complaint, petitioner alleged that while he was employed by the Pennsylvania Railroad, and as a result of the railroad's negligence, he sustained severe and permanent injuries to his legs, back and elsewhere, and a severe nervous shock. The accident occurred on July 29, 1955, in the railroad's Philadelphia station, when the rope on a mail-sack broke as petitioner pulled it, and he fell. Petitioner asserted that the railroad had negligently failed to provide a

safe place to work, safe equipment, or adequate inspection of mail sacks. Alleging great pain of body and mind, past and future medical expenses, and past and future impairment or destruction of earning capacity, he sought $100,000 damages.

In its third-party complaint against the United States, the Pennsylvania Railroad asserted that the negligence of post-office employees was the sole or concurrent cause of petitioner's injuries, specifically alleging the Government's use of a defective or damaged mail-sack. The railroad prayed judgment over against the United States in the amount of its adjudicated liability to petitioner, plus costs, expenses and counsel fees or, in the alternative, contribution in the amount of one-half its liability to petitioner. The United States denied liability, and pleaded the contributory negligence of petitioner as well as the primary, active, negligence of the railroad.

By an amended complaint filed November 21, 1957, petitioner increased his prayer for damages against the railroad to $150,000, and sought to state a claim against the United States under the Federal Tort Claims Act. On the Government's motion, the District Court (Kraft, J.) dismissed the Tort Claims Act complaint against the United States as barred by the applicable statute of limitations, 28 U.S.C. 2401(b). The opinion and order of dismissal were filed March 13, 1958, and are set forth in the Appendix, *infra*, pp. 20–23.

A local rule adopted by the District Court on June 2, 1958, "pursuant to F.R. Civ. P. 83 and supplementing F.R. Civ. P. 35", *supra*, pp 4–5, provides

for impartial medical examinations of injured persons in any personal injury case in which the judge is of the opinion that such examination "would be of material aid to the just determination of the case." The examination and report is to be made by physicians drawn from panels designated by the Pennsylvania Medical Society, after consultation with the court and with a committee appointed by the president of the Pennsylvania Bar Association. Under the rule, the judge is to fix the physicians' compensation, which shall be borne equally by the parties, unless otherwise ordered. The appointed physicians may be called to testify at trial by the parties or by the court, without additional compensation, and are subject to cross-examination by any party.

Pursuant to this rule, on October 1, 1958, the Pennsylvania Railroad moved for the examination of petitioner's back disability by a physician or physicians appointed from the court's panels of orthopedists, neurologists, or neurosurgeons, and an examination of petitioner's heart condition by a member or members of the panel of cardiologists. The motion (Appendix, *infra*, pp. 18–20) stated that petitioner had been examined and treated by physicians of his own choice and at the instigation of the railroad, and that diametrically opposed conclusions and had been reached with respect to two points: (1) whether petitioner had a herniated disc; and (2) whether a heart attack suffered by petitioner in October 1956, and a subsequent cardiac condition, were caused by the accident. In view of the conflict between the experts, the rail-

road alleged that impartial examinations and reviews of the medical history "would be of material aid to the just determination of the case."

By order entered October 9, 1958 (Pet. App. 1a–3a), the District Court (Van Dusen and Kraft, JJ.) appointed two impartial medical experts, and directed petitioner to submit himself to one for examination with respect to the "alleged 'ruptured intervertebral disc' ", and to the second regarding the "alleged 'traumatic heart attack' " and the connection between the accident and his present heart condition; the order also directed all parties to make available all prior medical reports and records. Finding that petitioner could not afford to pay one-half the experts' fees, the court directed that the Pennsylvania Railroad was to pay the entire amount, but that petitioner had to file a stipulation to pay one-half such fees to the railroad out of any amount recovered in this action; the railroad's payment and petitioner's stipulation were prerequisites to the receipt by each of the impartial medical reports.

On October 14, 1958, petitioner filed a petition for writs of mandamus and prohibition in the United States Court of Appeals for the Third Circuit, praying that the respondent judges be directed to annul the local rule of June 2, 1958 and the order in this case of October 9, 1958. Petitioner urged that the contemplated use of impartial medical examiners constituted a denial of his right to trial by jury. In addition, the imposition upon him of one-half the medical fees was challenged as a deprivation of property without due

process of law and in excess of the court's rule-making authority; the requirement that petitioner so stipulate as a prerequisite to receiving the medical reports was alleged to deny him trial by jury and to conflict with the Federal Rules of Civil Procedure.

On October 21, 1958, without awaiting the responses of the district judges and the parties to the litigation, the court below entered an order denying this petition (Pet. App. 4a).

ARGUMENT

While it did not itself seek the order for impartial medical examination, the United States as the third-party defendant may be subject to liability over and, therefore, has a substantial interest in a fair assessment of the damages sustained by the petitioner. Also, the United States has a continuing general interest in the trial of personal injury actions in the federal courts, because of the Federal Tort Claims Act and comparable statutes. For those reasons, we are filing a response to the petition for certiorari. We submit, first, that the order of the District Court, like other discovery orders, may not be challenged by way of a proceeding for mandamus or prohibition; considering solely that ground, the Court of Appeals' denial of the petition below was clearly proper. In any event, the District Court's order and the local rule are valid. What petitioner seeks to derogate as an unconstitutional infringement was no more than the implementation, by way of the local rule-making power, of the federal rules on pretrial discovery.

I

The effect of the District Court's challenged order is that petitioner will be required to submit to two examinations by impartial medical experts and to face the prospect that, at the trial, these physicians might be called upon to testify. Like other rulings regarding discovery of evidence before trial, or its admissibility at trial, the order of October 9, 1958, was interlocutory only. *Cogen* v. *United States*, 278 U.S. 221, 223–224; *Bowles* v. *Commercial Casualty Co.*, 107 F. 2d 169 (C.A. 4). Mandamus was properly denied, for its grant would have been "a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30.[1] "This is not a case where a court has exceeded or refused to exercise its jurisdiction * * * nor one where appellate review will be defeated if a writ does not issue * * *. *Parr* v. *United States*, 351 U.S. 513, 520; cf. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382–385. The summary denial below of the petition for mandamus or prohibition accords, therefore, with other rulings declining to use the pre-

[1] *Ex parte Peterson*, 253 U.S. 300, relied upon by petitioner, took jurisdiction over an original petition for mandamus in this Court which asserted that appointment of an auditor constituted a deprivation of trial by jury, but the Court thereupon rejected this view and denied the petition. As noted in *Roche* v. *Evaporated Milk Association*, 319 U.S. at 32, this case demonstrates the narrow office of mandamus. Furthermore, as we point out below, *Ex parte Peterson* supports the instant District Court action on the merits—*i.e.*, the use of court-appointed experts, and the apportionment of costs. See pp. 14, 16, *infra*.

rogative writs as a lever to pry into pretrial discovery proceedings. *E.g., Pennsylvania R. Co.* v. *Kirkpatrick*, 203 F. 2d 149 (C.A. 3); *Bank Line* v. *United States*, 163 F. 2d 133 (C.A. 2); 4 Moore, *Federal Practice* ¶26.37[4].

Nor does *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, lend support to petitioner's application. That case presented the "exceptional circumstances" of an "abdication of the judicial function" by reference to a master for trial despite previous admonitions of the Court of Appeals (*id.* at 256, 260), rather than a routine matter of pretrial discovery in anticipation of a trial before the court. Furthermore, in *Howes Leather Co.*, the Court of Appeals issued mandamus and this Court considered whether such action was within the lower court's power and a proper exercise of discretion (352 U.S. at 254–260); here, the court below has, to the contrary, refused to grant the writs prayed for. In view of the discretionary nature of the relief denied, no further review is called for at this time.

II

Furthermore, petitioner has fallen far short of presenting a "clear and indisputable" showing,[2] necessary for issuance of the extraordinary writs, that an error was committed by the District Court in promulgating its local rule of June 2, 1958, or in entering the particular order in this case.

1. (*a*). Rule 83 of the Federal Rules of Civil Procedure, *supra*, p. 4, authorizes the adoption by each District Court of "rules governing its practice not incon-

[2] *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384.

sistent with these rules." The local rule here challenged was adopted to supplement Rule 35 concerning pretrial physical and mental examinations of parties, *supra*, pp. 2–3. Under Rule 35, sustained by this Court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, the District Court may order a party to submit to a physical examination by a physician and may specify "the time, place, manner, conditions, and scope of the examination *and the person or persons by whom it is to be made.*" (Emphasis added.) *Sibbach* v. *Wilson & Co.* involved an order for examination "by one or more physicians appointed by the court" (312 U.S. at 6), and several reported cases show courts independently choosing doctors, at least when the parties failed to agree. *Pierce* v. *Brovig*, 16 F.R.D. 569, 570 (S.D.N.Y.); *The Italia*, 27 F. Supp. 785 (E.D.N.Y.); *Leach* v. *Greif Bros. Cooperage Corp.*, 2 F.R.D. 444 (S.D. Miss.). See Barnet, *Compulsory Medical Examinations under the Federal Rules*, 41 Va. L. Rev. 1059, 1071–1072. The use of impartial experts selected by the court, rather than those proffered by the parties, is clearly authorized by the terms of Rule 35.

The District Court for the Eastern District of Pennsylvania, in its local rule, sought to put on a regular basis such designations previously made *ad hoc*, and directed the establishment of a panel of medical experts. A similar practice for personal injury cases has been utilized in several state systems, and has been vigorously recommended by several authorities. 1957 *Annual Report of the American Bar Association*, pp. 184–185;[3] Peck, *Impartial Medical Testimony*, 22

[3] The American Bar Association has adopted (*1957 Annual Report*, p. 184):

* * * a national program, to be implemented at the local

F.R.D. 21, 26; 2 Wigmore, *Evidence,* Sec. 563(3)(C).

(*b*). No constitutional questions are presented by this practice, or by the use of the impartial experts at a trial. The trial court has the undoubted power to call and examine witnesses in order to elicit evidence which will assist a jury in its understanding of the case. *Glasser* v. *United States,* 315 U.S. 60, 82; Frankfurter, J., dissenting, in part, in *Johnson* v. *United States,* 333 U.S. 46, 54–55; *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.,* 143 F. 2d 826, 828–829 (C.A. 5); see *United States* v. *Brandt,* 196 F. 2d 653, 655 (C.A. 2); 9 Wigmore, *Evidence,* Sec. 2484. The presentation of impartial medical testimony by the courts' own witnesses is included in this authority. 9 Wigmore, *Evidence,* Sec. 2484; 2 *id.,* Sec. 563; see *Dinsel* v. *Pennsylvania Railroad Com-*

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level, of fostering the creation and employment of panels of impartial medical experts, under court aegis, in the pre-trial consideration and trial of personal injury cases especially in those communities where there is a volume of personal injury litigation in the courts and where there is a sufficient number of qualified doctors available to constitute a panel * * *

This program was recommended by the A.B.A.'s Section on Judicial Administration as having "the following wholesome and beneficial results: (1) It improves the process of finding the medical facts, vastly increasing the likelihood of reaching the right result. (2) It serves to relieve court congestion by bringing about the settlement of many cases which would otherwise have to be tried and which by their nature would entail lengthy trials. (3) It has a prophylactic effect upon the formulation and presentation of medical testimony in court. (4) The modest cost involved in the payment of independent experts is a positive economy in effecting a large saving in courts operations" (as quoted in Peck, *Impartial Medical Testimony,* 22 F.R.D. at 26).

pany, 144 F. Supp. 880, 881 (W.D. Pa.). As with experts presented by the parties, this practice does not trench upon the right to trial by jury, but provides further evidence for the jury's consideration. This Court has held that, even if a report of a court's expert would be accepted by the jury as *prima facie* correct, the constitutional right of jury trial was fully preserved by the parties' right to call, examine, and cross-examine any witnesses desired. *Ex parte Peterson*, 258 U.S. 300, 310–312.

(*c*). The order of October 9, 1958, directing medical examinations of petitioner was an appropriate exercise of the District Court's discretion under Rule 35 and the local rule. Rule 35 requires a showing that "the mental or physical condition of a party is in controversy", and "good cause shown". In this case, there are no problems as to the materiality of the evidence sought; and countervailing conditions of pain, discomfort, or danger are likewise not present. See 4 Moore, *Federal Practice*, ¶¶35.03, 35.04. Furthermore, there is nothing to support petitioner's contention that "good cause" under Rule 35 must be limited to the clarification of complex issues, like the auditor's report in *Ex parte Peterson, supra*. A medical examination has quite different objectives; as urged by the American Bar Association (footnote 3, *supra*), one of its foremost benefits is the resolution of, or a "prophylactic effect" upon, a conflict between the parties' own experts. In these circumstances, an impartial examination would "be of material aid to the just determination of the case", within the terms of the District Court's rule.

2. (*a*). Just as the District Court established by local rule a regular basis for impartial examinations, so it set forth its practice regarding the apportionment of the costs of such examination. Under Rule 35, the payment of experts' fees is properly one of the "conditions" of the examination which the court may specify.

The general provision governing costs in civil cases is in Rule 54(d), *supra*, p. 3, which states that, absent specific statute or federal rule, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." On numerous occasions, district courts have "otherwise direct[ed]" and taxed certain items against the prevailing party or apportioned them between the parties. 6 Moore, *Federal Practice* ¶54.70[5]. It has been found particularly appropriate to divide between the parties the costs of an auditor, master, or other person called upon by the court itself to aid in resolution of the case. *E.g.*, *Dyker Bldg. Co.* v. *United States*, 182 F. 2d 85, 89 (C.A.D.C.); *Bowen Motor Coaches* v. *New York Casualty Co.*, 139 F. 2d 332, 334 (C.A. 5). Cf. *Ex parte Peterson*, 253 U.S. 300, 315–316; Frankfurter, J., dissenting in part, in *Johnson* v. *United States*, 333 U.S. 46, 54; *Whipple* v. *Cumberland Cotton Co.*, 3 Story 84, 86 (C.C. Me., Story, J. at circuit).

The impartial medical examination here involved is another appropriate exercise of such discretion. And instead of leaving the matter to *ad hoc* determination, the District Court below properly acted under Rule 83 to announce its policy in a local rule—that com-

pensation of the impartial medical experts "shall be paid equally by each party to the litigation unless [the] judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations". *Supra*, p. 5.

(*b*). Petitioner relies upon *Ex parte Peterson*, 253 U.S. 300, for the proposition that costs may not be taxed against a prevailing party in actions at law. But *Peterson* demonstrates the contrary. While the opinion in that case followed the common law rule, it pointed out that discretionary apportionment of costs or their assessment against a prevailing party was permitted in equity proceedings, and "[t]he advantages of such a flexible rule are obvious." 253 U.S. at 317. The proviso of Rule 54(d), *supra*, p. 3 was drafted in order to repudiate the common law rule followed perforce in *Peterson*, and relied upon by petitioner. *Dyke Bldg. Co.* v. *United States*, 182 F. 2d 85, 89 (C.A.D.C.); Notes of Advisory Committee on Rules to Rule 54, Subdivision (d). There is no doubt, therefore, that apportionment is now possible, and that the local rule here challenged was within the power of the District Court.

(*c*). Finally, the particular application of the local rule as to costs in the order of October 9, 1958 was proper. As already indicated, *supra*, p. 15, division between the parties of the costs of a court-appointed expert is a traditional and reasonable method. It was proper to limit contribution to plaintiff and defendant, the petitioner and the railroad, and to exclude the United States, which is subject only to third-party liability, and was not directly involved in the rail-

road's motion. The District Court's fairness to petitioner is shown by the provision of the order which does not require him to contribute anything unless he prevails in this action, and then only from the amount of such recovery.

Petitioner also contends that Rule 35 precludes the court from requiring him now to stipulate that he would ultimately pay his one-half share. But if petitioner is correct that he is entitled to the medical report without any agreement to pay a share, no damage can be sustained by him until the costs are assessed; at that time, he can contest the assessment and show that the stipulation was involuntarily imposed upon him. For that reason, this point does not warrant consideration at the present stage.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1959.

APPENDIX

Motion of Pennsylvania Railroad For Impartial Medical Examinations, Filed October 1, 1958

Defendant, The Pennsylvania Railroad Company, requests the Court, in accordance with its local rule, to order medical examinations and reports thereon by court appointed physicians, and in support of its motion defendant states the following facts:

1. This is an action under the Federal Employers' Liability Act, in which defendant, The Pennsylvania Railroad Company, joined the United States as a third-party defendant under the Federal Tort Claims Act.

2. Plaintiff was on or about July 29, 1955, the time of the alleged accident, an employee of the defendant railroad assigned to duties involving the handling of government mail sacks at one of defendant's stations. In the course of his duties he allegedly fell and suffered a back injury.

3. Since his injury he has undergone medical examinations and treatment at the instigation of the defendant railroad, and he has been examined and treated on numerous occasions by physicians of his own choice.

4. Some months subsequent to the alleged accident plaintiff suffered a heart attack.

5. Defendant is led to believe that at the trial plaintiff will make, perhaps among others, two medical claims:

(a) That the accident caused a so-called "ruptured intervertebral disc"; and
(b) That the accident caused his heart attack.

6. With respect to the "disc" claim, the most recent report which defendant has received from plaintiff's attorney is dated April 4, 1957, and is by Oscar Corn, M.D., in which the doctor says in part:

> Whether the myelogram is positive or negative, this patient must be considered to have a herniated disc.

The most recent report from an examiner for the defendant railroad is dated December 12, 1957 and is by Richard Kaplan, M.D., an orthopedist, in which he states in part:

> I certainly do not feel that he has any evidence of any herniated disc.

7. With respect to the alleged "traumatic heart attack", the most recent report which defendant has received from plaintiff's attorney is dated November 29, 1957 and is by Samuel Bellet, M.D., a cardiologist, in which the doctor says in part,

> It is my opinion that the accident sustained on July 30, 1955 contributed materially to his present condition.

The most recent report from an examiner for the defendant railroad is dated July 7, 1958 and is by W. D. Stroud, M.D., a cardiologist, in which he states in part,

> In my opinion, there is *no possible connection* between his accident on July 30, 1955—with his subsequent orthopedic disabilities—and his past and present heart condition.

8. In view of the diametrically opposed position taken by plaintiff's and defendant's doctors, impartial examinations of plaintiff and impartial reviews of the past medical history would be of material aid to the just determination of the case.

9. This case is No. 79 on the current jury trial list and may be reached for trial during the three weeks commencing October 13, 1958.

Wherefore, the Court is requested to appoint either a member or members of a panel of examining physicians to examine plaintiff relative to this alleged back disability (from either the panel of orthopedists, or of neurologists or of neurosurgeons) and to appoint a member or members of a panel to examine plaintiff pertaining to his heart condition (from the panel of cardiologists).

(S) F. Hastings Griffin, Jr.
F. HASTINGS GRIFFIN, JR.
Attorney for Defendant,
The Pennsylvania Railroad Company.

District Court Opinion Sustaining United States' Motion To Dismiss Amended Complaint, Filed March 13, 1958

The United States, one of two defendants in this case, moves to dismiss the amended complaint on the ground that the pleading itself discloses that plaintiff's claim against the government is barred by the statute of limitations.

Plaintiff's original complaint, filed July 17, 1956, sought recovery only against the Pennsylvania Railroad Co. under the Federal Employers' Liability Act for an injury suffered on July 29, 1955. The railroad answered on August 10, 1956 and, some months later, joined the United States as third-party defendant. The third-party complaint was served January 10, 1957

and the government filed its answer thereto on March 10, 1957.

Subsequently, on November 21, 1957, the plaintiff, disregarding the provisions of F.R.C.P. 15(a), filed his amended complaint without leave of court. In this pleading the United States was, for the first time, named as an original party defendant. The amended complaint continued the railroad as a defendant, substantially repeated the substantive averments of the original complaint and purported to state a cause of action against the United States under the Federal Tort Claims Act, 28 U.S.C.A. 1346(b).

Plaintiff first challenges the propriety of the government's motion to dismiss. He points out that F.R.C.P. 12(b), which enumerates certain defenses which, at the defendant's option, may be made by motion, makes no reference to a statute of limitations defense. Plaintiff also insists that F.R.C.P. 8(c) requires this defense to be pleaded affirmatively in a responsive pleading. Usually this is so. However, where the complaint itself reveals the existence of a statute of limitations defense, that defense may be raised by a motion to dismiss. *Wagner* v. *N.Y., Ont. & West. Ry.*, 146 F. Supp. 926 (M.D. Pa. 1956); *Delman* v. *Federal Products*, 136 F. Supp. 241 (D.R.I. 1955); *Shandelman* v. *Shuman*, 92 F. Supp. 334 (E.D. Pa. 1950).[1]

[1] For other cases supporting this rule, see: *Rohner* v. *Union Pacific R. Co.*, 225 F. 2d 272 (10th Cir. 1955); *Kincheloe* v. *Farmer*, 214 F. 2d 604 (7th Cir. 1954); *Taylor* v. *Houston*, 211 F. 2d 427 (D.C. Cir. 1954); *A. G. Reeves Construction Co.* v. *Weiss*, 119 F. 2d 472 (6th Cir. 1941); *Harrington* v. *Yellin*, 25 Fed. Rules Serv. 12 e. 22, Case 1 (1958); *Lomax* v.

In pertinent part, the applicable statute (28 U.S. C.A. § 2401(b)) provides:

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *.

The plaintiff next insists that, because the defendant railroad impleaded the government as a third-party defendant within two years from the time plaintiff's cause of action accrued, the statute of limitations was tolled. This is an ingenious but untenable contention. *Carlisle* v. *Monongahela Ry. Co.*, 16 F. R. D. 426 (W. D. Pa. 1954); *Horan* v. *Pope & Talbot, Inc.*, 119 F. Supp. 711 (E.D. Pa. 1953); *Sommer* v. *Scranton-Spring Brook Water Service Co.*, 3 F.R.D. 27 (M.D. Pa. 1943). The amended complaint *began* the plaintiff's action on *his* claim against the United States too late. It is of no avail to the plaintiff that the railroad began its action on *its* claim against the government in time.

This conclusion makes unnecessary any disposition of the government's second contention that the amended complaint should be stricken because it was filed without leave of court in violation of F.R.C.P. 15(a), and thus deprived the government of the opportunity to raise the question in limine by objec-

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United States, 155 F. Supp. 354 (E.D. Pa. 1957); *O'Malley* v. *Wyoming National Bank*, 15 F.R.D. 457 (M.D. Pa. 1954); *Magnotta* v. *Leonard*, 16 Fed. Rules Serv. 12b.325, Case 1 (M.D. Pa. 1952); *Burrell* v. *La Follette Coach Lines*, 97 F. Supp. 279 (E.D. Tenn. 1951); *Stanley* v. *Bird*, 85 F. Supp. 358 (W.D. Ky. 1949); *Berry* v. *Heller*, 79 F. Supp. 476 (E.D. Pa. 1948); *Gerard* v. *Mercer*, 62 F. Supp. 28 (D. Mont. 1945); *Callahan* v. *Chesapeake & Ohio R. Co.*, 40 F. Supp. 353 (E.D. Ky. 1941); *Wilson* v. *Shores-Mueller Co.*, 40 F. Supp. 729 (N.D. Iowa 1941); *Cramer* v. *Aluminum Cooking Utensil Co.*, 4 Fed. Rules Serv. 12b. 325, Case 4 (1941).

tion to the allowance of an amendment which sought to bring in a new party defendant in whose favor the statute of limitations had already run.

District Court Order Dismissing Amended Complaint Against United States, Filed March 13, 1958

Now, March 13, 1958, the motion of the United States of America is granted and, as to it, the amended complaint is dismissed.

(S) C. WILLIAM KRAFT, JR., *Judge.*

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